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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

ACCESS CHARGE REFORM

PRICE CAP PERFORMANCE REVIEW  
FOR LOCAL EXCHANGE CARRIERS

TRANSPORT RATE STRUCTURE  
AND PRICING

END USER COMMON LINE CHARGES

CC DOCKET NO. 96-262

CC DOCKET NO. 94-1

CC DOCKET NO. 91-213

CC DOCKET NO. 95-72

COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION  
ON PETITIONS FOR RECONSIDERATION

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## **SUMMARY**

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 500 entities engaged in, or providing products or services in support of, telecommunications resale, offers the following comments on the multiple petitions seeking reconsideration of the First Report and Order in the captioned proceeding:

- TRA urges the Commission to reduce the newly-adopted multi-line business preferred interexchange carrier charge ("PICC") to the level at which the primary residential and single-line business PICC is currently set, to be increased and/or reduced over the next several years in tandem with the primary residential and single-line business PICC. This action is necessary to avoid inflicting serious competitive and financial harm on the small carrier community.
- TRA urges the Commission to reconsider its decision to eliminate the "unitary" tandem-switched transport rate structure option. Not only is the "unitary option" strongly favored by interexchange carriers ("IXCs"), commonly used and effective in fostering a competitive interexchange market, but its elimination would adversely impact small IXCs and rural consumers. Moreover, elimination of the "unitary option" would occasion unreasonable discrimination and uneconomic market distortions.
- TRA joins with other petitioners in urging the Commission to reinstate its pre-existing pricing rule for tandem switching, thereby eliminating the dramatic, non-cost-based inflation of the tandem switching charge produced by allocating nearly 100 percent of the tandem switching revenue requirement to this rate element.
- TRA urges the Commission to reconsider its deferral until January 1, 1998, of the exemption from payment of the per-minute transport interconnection charge ("TIC") granted competitive access providers ("CAPs") which provide their own transport facilities.
- TRA urges the Commission to reaffirm that competitive local exchange carrier ("LECs") which provide local exchange/exchange access service through unbundled network elements are not required to pay access charges in addition to the charges assessed on them by incumbent LECs for lease of the unbundled network elements.

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**COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION  
PETITION FOR RECONSIDERATIONS**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby submits the following comments on the multiple pending petitions for reconsideration of the First Report and Order, FCC 97-158 (released May 16, 1997).<sup>1</sup> Specifically, TRA supports (in whole or in part as identified below) the petitions filed by America's Carriers Telecommunications

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<sup>1</sup> TRA also filed a Petition for Reconsideration of the First Report and Order in the captioned docket. Therein, TRA urged the Commission (i) to reduce the multi-line business preferred interexchange carrier charge ("PICC") to the level of the residential and single-line business PICC; and (ii) to reinstate the "unitary" option for purchasing tandem-switched transport. TRA argued that these actions are necessary to avoid inflicting serious competitive and financial harm on the small carrier community.

Association ("ACTA"), AT&T Corp. ("AT&T"), the Competitive Telecommunications Association ("CompTel"), the County of Los Angeles, California ("LA County"), Excel Telecommunications, Inc. ("ExCel"), Frontier Corporation ("Frontier"), KLP, Inc. d/b/a Call-America ("Call-America") and Yavapai Telephone Exchange, Inc. ("YTE") (collectively, "Call-America/YTE"), RCN Telecom Services, Inc. ("RCN"), Telco Communications Group, Inc. ("Telco"), Teleport Communications Group, Inc. ("Teleport"), WorldCom, Inc. ("WorldCom"), and U.S. Long Distance, Inc. ("USLD"). TRA opposes (in whole or in part as identified below) the reconsideration requests filed by the Rural Telephone Companies ("Rural Companies") and the Rural Telephone Coalition ("Rural Coalition").

## **ARGUMENT**

### **I. Local Governments, Business Users and Carriers Join With TRA in Urging the Commission to Reconsider its Imposition of a Disproportionately Large PICC on Multi-line Business Users**

In its pending Petition for Reconsideration, TRA urged the Commission to reduce the newly-adopted multi-line business preferred interexchange carrier charge ("PICC") to the level at which the primary residential and single-line business PICC is currently set, to be increased and/or reduced over the next several years in tandem with the primary residential and single-line business PICC. TRA explained that imposition of a \$2.75 (and ultimately higher) multi-line business PICC would likely double the effective cost of access (net of the access charge reductions mandated by the Commission) for small interexchange carriers ("IXCs"), placing such providers between the proverbial "rock and a hard place." The low volume small business customers which comprise the bulk of small IXCs' customer bases would not be able to tolerate the dramatic rate increases a 'pass-through' of the multi-line business PICC would produce and the small carriers have

neither the traffic volumes over which to spread the new charges without significantly increasing rates nor the operating margins within which to absorb those charges.

While it acknowledged the Commission's desire to insulate residential customers from dramatic rate increases, TRA disagreed with the Commission's assessment that the imposition of a PICC five times greater than that assessed on primary residential lines and single line business users is a "reasonable measure" for addressing such "affordability concerns."<sup>2</sup> TRA explained that not only would this "solution" be discriminatory, squarely at odds with the principles of cost-causation articulated by the Commission, and the very type of implicit subsidy the Congress directed the Commission to eliminate, but its impact on small IXCs would likely be devastating. Nor, TRA noted, is it an answer to assert that the \$2.75 multi-line business PICC would be part of a transitional mechanism that likely would be eliminated over the next three to four years, because the competitive and financial damage inflicted on the small carrier community during the transitional period would be widespread and irreparable. As TRA pointed out, the logical corollary to the Commission's asserted view that its rules "should promote competition, not protect certain competitors" is that those rules should not hinder competition or unduly burden one class of competitors, particularly when that class of competitors is comprised of the smallest providers.

TRA's objections to the multi-line business PICC found support in a variety of sectors. Small to mid-sized IXCs and their representatives echoed TRA's concerns that imposition of the inflated multi-line business PICC would produce devastating economic and competitive

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<sup>2</sup> Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158, ¶¶ 38, 102 (May 16, 1997), *pet for stay denied* FCC 97-216 (June 18, 1997), *pet. for recon. pending, pet. for rev. pending* Southwestern Bell Telephone Company v. FCC, Case No. 97-2620 (and consol. cases) (8th Cir. June 16, 1997).

impacts on smaller carriers and their small business customers. For example, Call-America/YTE report that the cost of access to Call America and YTE would increase by nearly 100 and 500 percent, respectively, consuming Call America's net per-minute profit four times over.<sup>3</sup> CompTel supplies data from various of its small carrier members documenting increases in access costs (net of the access charge reductions mandated by the Commission) ranging from 46.1 to 474.2 percent.<sup>4</sup>

These petitioners, joined by others such as ACTA and USLD, confirm that these dramatic cost increases would be ruinous for small carriers. ACTA describes the severe economic hardship the multi-line business PICC would impose on its small IXC members:

Now, small carriers are faced with a "Catch-22" situation in regard to their options to compensate for the increased costs incurred as a result of the PICC. They are faced with either raising their calling rates or absorbing the higher costs. The former option will surely result in a loss of customers to the largest IXCs who can afford to amortize the PICC over more minutes of use thereby increasing their ability to absorb the costs. If the small carriers attempt to absorb the costs of the PICC, they place in jeopardy their already thin profit margins, and, as a result, many will be forced to go out of business.<sup>5</sup>

But small IXCs are not the only entities that expressed serious concerns regarding the economic impacts of the imposition of the inflated multi-line business PICC. While small carriers and their representatives argued that many small businesses would experience substantial increases in their telecommunications costs, the users themselves made this point far more forcefully. Thus, the International Communications Association ("ICA") describes the "enormous rate shock" that customers of Centrex services, including colleges, universities and state and local governments,

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<sup>3</sup> Petition of Call America/YTE at 3 - 4.

<sup>4</sup> Petition of CompTel at 3, Att. 1.

<sup>5</sup> Petition of ACTA at 6 - 7.

would experience as a result of the imposition of the multi-line business PICC.<sup>6</sup> LA County provides a far more graphic description of the “rate shock:”

If the IXC's to which the County's 86,000 access lines are presubscribed were to attempt to flow-through the PICC costs directly to the County, together with the various other new and increased charges that would be imposed by the Commission's Order, the potential total cost increases associated with service provided to the County could amount to approximately \$4.6-million annually (\$1.7-million in SLCs, \$2.8-million in PICCs, \$0.07- million in switched access reductions, \$-0.2-million in USF surcharge). This amounts to an increase of 11% overall in the County's \$42-million annual telecommunications billing, and an increase of 270% in the County's \$1-million in interstate billing levels!<sup>7</sup>

Call-America/YTE confirm this assessment by computing the financial impact on twelve illustrative customers of a “pass-through” of the multi-line business PICC. As calculated by Call America/YTE, these customers would experience cost increases ranging from 10.91 to 1169.90 percent.<sup>8</sup>

TRA wholeheartedly agrees with CompTel that “[i]t is inherently unreasonable for the FCC to devise a transition subsidy plan that has an immediate and in some cases irreparable adverse impact upon the carriers and subscribers funding the subsidy.”<sup>9</sup> CompTel is certainly correct that “[t]he FCC should not adopt a transitional subsidy mechanism that causes significant competitive harm and large rate increases for small business customers.”<sup>10</sup>

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<sup>6</sup> Petition of ICA at 2 - 4.

<sup>7</sup> Petition of LA County at 2 (footnote omitted). *See also* Petition of the United States Telephone Association (“USTA”) at 2 - 4.

<sup>8</sup> Petition of Call America/YTE at 4, Att. A.

<sup>9</sup> Petition of CompTel at 3.

<sup>10</sup> *Id.* at 5.



**II. The Petitions Demonstrate a Pressing Need for the Commission to Grant TRA's Request that it Reconsider its Elimination of the Unitary Tandem-Switched Transport Rate Structure Option**

In its Petition for Reconsideration, TRA urged the Commission to reconsider its decision to eliminate the "unitary" tandem-switched transport rate structure option pursuant to which IXC's have been able to purchase tandem-switched transport between the serving wire center and the end office at a single, per-minute rate, with mileage measured between the two offices without reference to the physical routing of the traffic. TRA listed a number of reasons for which the "unitary option" should be retained. First, TRA pointed out that the availability of the "unitary option" is strongly favored by most IXC's and seemingly opposed by no one; in fact, an industry-wide consensus appears to have emerged during this proceeding in favor of making permanent the heretofore interim transport rate structure. Second, TRA emphasized that the "unitary option" is commonly used; indeed, to TRA's knowledge, virtually all IXC's that utilize tandem-switched transport currently acquire it under the unitary option. Third, TRA pointed out that the "unitary option" has worked well, "facilitat[ing]," as the Commission has acknowledged, "the growth of small IXC's to compete with larger carriers," fostering a "pluralistic supply in the interexchange market."<sup>11</sup>

Fourth, TRA stressed that elimination of the "unitary option" would result in significant cost increases for many IXC's, given that under the sole remaining -- "partitioned" -- tandem-switched transport rate structure option, mileage measurements is based upon the physical routing of the traffic rather than the distance between the end office and the serving wire center, and

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<sup>11</sup> Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158 at ¶ 180.

one fixed charge now paid under the “unitary option” would be replaced by two. Fifth, TRA showed that the resultant adverse financial and associated competitive impacts would be borne primarily by those least able to withstand the burden -- *i.e.*, smaller IXC’s and rural, and even suburban, consumers, the former because they are the primary users of tandem routing and the latter because they are served primarily by tandem-switched transport. And finally, TRA argued that given the often identical routing of tandem-switched and direct-trunked traffic, the “unitary option” is both non-discriminatory and as consistent with principals of cost-causation as its direct-trunked transport counterpart.

Many of the pending petitions for reconsideration confirm and amplify upon TRA’s views in this respect. WorldCom, for example, demonstrates that limiting tandem-switched transport users to the “partitioned option” discriminates between users of tandem-switched transport and dedicated interoffice transport. As WorldCom explains, tandem-switched and dedicated interoffice transport both “use the same types of circuits on the ILEC’s interoffice transmission network; the cost of transport does not vary based on the number of minutes for either form of transport; and both forms of transport typically traverse one or more hubs as they pass between the ILEC wire centers designated as service wire centers (“SWCs”) and those designated as end offices.”<sup>12</sup> Accordingly, it would be discriminatory not only to deny users of tandem-switched transport an end-to-end rate option comparable to that available to users of direct-trunked transport, but to apply a far more mileage-sensitive rate structure to the former than the latter. Or as couched by WorldCom, “it is

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<sup>12</sup> Petition of WorldCom at 10 - 11.

arbitrary, capricious, and unreasonably discriminatory to apply radically different rate structures to forms of transport with identical cost structures.”<sup>13</sup>

Telco, Frontier, USLD, Call America/YTE and CompTel all confirm TRA’s understanding that the routing of tandem-switched transport and direct-trunked traffic is often identical.<sup>14</sup> Telco, for example, explains:

[D]ue to the incumbent LECs’ use of SONET rings and hub and spoke architecture, both tandem-switched and direct-trunked transport customers’ calls are in fact often transported over identical routes. The only difference is that the circuits utilized for direct-trunked transport customers are all dedicated while at least one of the circuits utilized for tandem-switched transport customers are shared.<sup>15</sup>

And WorldCom and CompTel share TRA’s view that the Commission is mistaken in its suggestion that it is reasonable to deny small IXC’s an end-to-end access option such as that available to the large carrier purchasers of direct-trunked transport simply because the former “obligate the LEC to transport their traffic between the serving wire center and the tandem serving a particular end office or group of end offices.” As explained by CompTel:

While it is true that long distance carriers ordering tandem-switched transport are effectively requiring ILECs to route their traffic through the tandem location, that does not distinguish tandem-switched from direct-trunked transport users. In many cases, when a long distance carrier desires to route traffic on a dedicated basis between an end office and a serving wire center, there is not “direct” route between those two points except through one or more tandem locations. In that case, the long distance carrier has effectively required the ILEC to engage in routing through the tandem location, just as the smaller

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<sup>13</sup> Id. at 12.

<sup>14</sup> Petition of Telco at 4 - 7; Petition of Frontier at 3 - 4; Petition of USLD at 6; Petition of Call America/YTE at 9; Petition of CompTel at 18 - 20.

<sup>15</sup> Petition of Telco at 5 - 6 (footnotes omitted).

long distance carrier has effectively required the ILEC to engage in tandem-switched routing by ordering per-minute routing. The advent of ring architecture . . . only underscores the extent to which even direct-trunked transport users depend upon tandem routing whether they prefer it or not.<sup>16</sup>

The petitions also support TRA's assessment of the adverse financial and competitive impacts of the elimination of the "unitary option." Frontier, for example, predicts that "its elimination would have devastating effects on interexchange competition," explaining that:

Abandoning the unitary rate structure would markedly exacerbate [the "incremental cost disadvantage for transport services . . . compared to AT&T" which smaller interexchange carriers now face under "the interim transport rate structure -- which retained the unitary pricing option."]. For the dedicated link, it would require smaller interexchange carriers, such as Frontier, to purchase dedicated services -- largely at the DS-0 (voice grade) level -- while AT&T could provision a far larger proportion of its traffic over DS-3 circuits. The relative price difference between a DS-0 circuit and a DS-0 channel on a DS-3 circuit is substantial. In a highly competitive market, such cost differences, obviously, have significant competitive consequences.<sup>17</sup>

WorldCom, USLD, RCN, Excel and CompTel concur with Frontier that, as described by WorldCom:

[R]equiring tandem-switched transport users, but not dedicated interoffice transport users, to pay based on the three-part rate structure creates unreasonable discrimination in favor of large incumbent carriers -- AT&T with its large market share that is the legacy of its historical monopoly, GTE, and in the near future, the BOCs' long distance affiliates.<sup>18</sup>

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<sup>16</sup> Petition of CompTel at 19 (citation omitted).

<sup>17</sup> Petition of Telco at 5 - 6 (footnotes omitted).

<sup>18</sup> Petition of WorldCom 16 - 17 (emphasis in original); *see also* Petition of USLD at 6; Petition of RCN at 10 - 11; Petition of Excel at 9 - 10; Petition of CompTel at 20.

Exacerbating this problem is TRA's concern, shared by a number of other petitioners,<sup>19</sup> that reliance upon a "partitioned option" alone would make small IXCs vulnerable to strategic network deployment and routing decisions by incumbent local exchange carriers ("LECs") which are competing with them in the "in-region," interLATA market. As couched by Call America/YTE, "[f]orcing small carriers to purchase tandem-switched transport under a three-part rate structure will place those carriers at the mercy of the ILECs' tandem deployment decisions."<sup>20</sup> Moreover, as pointed out by WorldCom, exclusive reliance on the "partitioned option" introduces a "pernicious, anti-efficiency incentive to the ILECs' planning process."<sup>21</sup> As WorldCom explains:

First, under that rate structure, ILECs will receive access revenues if they deploy additional tandem switches. IXCs would be charged for additional circuits to reach such tandems, and distance-based charges would increase. Second, ILECs will have incentives to locate tandem switches as far as possible from the wire centers serving IXCs' points of presence, so as to maximize their tandem-switched transport revenues.<sup>22</sup>

TRA strongly urges the Commission to reinstate the "unitary option" for the myriad reasons set forth above and in TRA's Petition for Reconsideration. As succinctly put by WorldCom, "the elimination of the unitary rate structure option for tandem-switched transport is not cost-based,

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<sup>19</sup> Petition of Call America/YTE at 9; Petition of CompTel at 19 - 21; Petition of WorldCom at 15 - 18.

<sup>20</sup> Petition of Call America/YTE at 9.

<sup>21</sup> Petition of WorldCom at 15.

<sup>22</sup> Id.

is unreasonably discriminatory, and will have effects on ILEC efficiency, the interstate access marketplace, and the long distance marketplace that will not advance the public interest.”<sup>23</sup>

### **III. TRA Endorses Those Petitions Urging the Commission to Reinstate the Pre-existing Pricing Rule for Tandem Switching**

A number of petitioners, including WorldCom, CompTel, ACTA, Call America/YTE, USLD and Frontier, urge the Commission to revisit its determination to dramatically increase the tandem switching charge by allocating to it nearly 100 percent of the tandem revenue requirement.<sup>24</sup> The large majority of these petitioners recommend that the Commission reinstate its pre-existing pricing rule for tandem switching. TRA concurs with the concerns expressed by these petitioners and endorses the identified relief.

In establishing the transport interconnection charge (“TIC”), the Commission directed LECs to recover 80 percent of the tandem switching revenue requirement through the per-minute TIC, with the remainder to be recovered through the tandem switching charge. In reforming its access charge regime, the Commission reallocated to tandem switching rates much of the tandem switching revenue requirement that had been recovered by the TIC. As calculated by CompTel and others, the result would be roughly a 400 percent increase in tandem switching charges.<sup>25</sup>

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<sup>23</sup> Id. at 17.

<sup>24</sup> Petition of WorldCom at 4 - 10; Petition of CompTel at 7 - 16; Petition of ACTA at 2, 4; Petition of Call America/YTE at 8 - 9; Petition of USLD at 3 - 5; and Petition of Frontier at 7 - 13.

<sup>25</sup> Petition of CompTel at 7 - 9, Att. 2; Petition of Call America/YTE at 8 - 9; Petition of USLD at 3-5.

TRA agrees with CompTel that “[t]he FCC’s decision to re-allocated approximately 80% of the tandem revenue requirement to the tandem switching charge is a fundamentally misguided effort that defeats t[he] FCC’s objective of establishing market-driven, cost-causative interstate access rates.”<sup>26</sup> The resultant charge would recover an amount many times the actual costs incurred in providing tandem switching. CompTel shows that current tandem switching rates are “roughly equivalent to the interim rates established for the provision of tandem switching on a network element basis,” concluding that “current tandem switching rates are reasonably close to market-driven, cost-based levels.”<sup>27</sup> Frontier points out that there is substantial evidence that would suggest “that -- in an economically meaningful sense -- even the 20%of the residual that the Commission allocated to the tandem switching rate elements *over-allocates* costs attributable to common transport users.”<sup>28</sup>

The adverse financial and competitive impacts of such immediate and dramatic rate inflation on small to mid-sized IXC is manifest. As TRA has explained, small IXCs rely far more heavily on tandem switching than larger IXCs. Accordingly, a non-cost-based tandem switching charge severely hamstrings small IXCs in their efforts to compete with large carriers. As eloquently stated by USLD:

This moves makes the underlying cost of providing long distance services imbalanced, giving direct trunk transport carriers an economic advantage that cannot otherwise be overcome by the smaller carriers utilizing tandem switched transport. The Commission’s decision in this regard translates into a deadly price

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<sup>26</sup> Petition of CompTel at 8.

<sup>27</sup> Petition of CompTel at 8.

<sup>28</sup> Petition of Frontier at 11 - 12 (emphasis in original).

squeeze that renders smaller carriers completely unable to continue to provide services they have contracted to provide at profitable rates. . . . If suddenly the cost of Mitsubishi automobile engines increased 400% for Chrysler but not for Dodge, is it not clear to see that Dodge will have gained a tremendous competitive advantage over Chrysler which is in no way substantiated by the better judgment or business acumen of the beneficiary?<sup>29</sup>

TRA's switched-based resale carrier members, as well as those TRA "switchless" resale carrier members that resell the services of small to mid-sized facilities-based providers, would experience the "price squeeze" to which USLD refers.

Nor are small carriers the only victims of switching transport charge inflation. As CompTel and USLD point out, rural and suburban consumers would be deprived of competitive alternatives as small carriers are forced by dramatic price increases to abandon rural and suburban markets.<sup>30</sup> Moreover, the dramatic increase in tandem switching charges would occasion network inefficiencies, as those IXC's which are in a position to do so migrate to direct-trunked transport based on false pricing signals. Indeed, CompTel demonstrates that "cross-over points" would decline to a mere fraction of economically efficient levels as a result of the dramatic increases in tandem switch arrangements, prompting otherwise economically irrational network investment and design.<sup>31</sup>

TRA also agrees with CompTel, Frontier and WorldCom that the Commission's inflation of the transport switching charge is inconsistent with directives of the U.S. Court of Appeals for the District of Columbia in Competitive Telecommunications Association, 87 F.3d 522

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<sup>29</sup> Petition of USLD at 4.

<sup>30</sup> Petition of USLD at 4 - 5; Petition of CompTel at 7.

<sup>31</sup> Petition of CompTel at 10 - 11.



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(D.C. Cir. 1996).<sup>32</sup> In that case, the D.C. Circuit directed the Commission to apply nondiscriminatory cost-based overhead loadings or “provide a reasoned explanation for its change of course.” The Commission declined to heed the former directive and failed to satisfy the latter requirement. With respect to the latter, the Commission opined only that “[i]f we were to require equalized overhead loadings, we would be interfering with the market discipline on which we are primarily relying.”<sup>33</sup> Moreover, the Commission addressed marginal misallocations of costs to the tandem switching revenue requirement.<sup>34</sup> Nowhere, however, did the Commission offer a “reasoned explanation” for concededly inflating tandem switching charges so far above cost that the resultant rates would skew interexchange competition, impacting most adversely small carriers, and as a direct result, limiting competitive options for rural consumers.

TRA, accordingly, supports CompTel’s request that the Commission reinstate the pre-existing pricing rules for tandem switching charges. TRA further concurs with CompTel that tandem switching charges should be conformed to the permanent rates established for the equivalent unbundled network element.

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<sup>32</sup> Petition of CompTel at 11 - 15; Petition of WorldCom at 4 - 10; Petition of Frontier at 11 - 13.

<sup>33</sup> Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158 at ¶ 204.

<sup>34</sup> Id. at ¶ 205.

**IV. TRA Agrees with AT&T and TCG that CAPs which Provide Their Own Transport Should Be Immediately Exempted from the Obligation to Pay the Per-Minute TIC**

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AT&T and TCG urge the Commission to reconsider its deferral until January 1, 1998, of the exemption from payment of the per-minute TIC granted competitive access providers ("CAPs") which provide their own transport facilities.<sup>35</sup> The Commission first identified without explanation the January 1, 1998 start date in an Errata, ¶ 4 (released June 4, 1997). TRA agrees with AT&T and TCG that this deferred date conflicts with the rationale upon which the Commission founded the exemption. In relieving CAPs of the obligation to pay the per-minute TIC on traffic which does not transit incumbent LEC transport facilities, the Commission recognized that its "current policy which requires [a] competitive entrant[] to pay the TIC even in cases where it provides its own transport, is inconsistent with the procompetitive goals of the 1996 Act."<sup>36</sup> Moreover, the Commission found that allowing incumbent LECs to levy the TIC on CAP traffic which does not transit incumbent LEC transport facilities requires "competitors of the incumbent LEC [to] pay some of the incumbent LECs' transport costs."<sup>37</sup> The Commission, having made the well-reasoned policy judgment that such a requirement would hinder competition, should act promptly to further the Congressional goal of fostering the competitive provision of local exchange/exchange access service by making Rule 69.155, 47 C.F.R. § 69.155, effective immediately.

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<sup>35</sup> Petition of AT&T at 10 -12; Petition of TCG at 2 - 4.

<sup>36</sup> Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158 at ¶ 240.

<sup>37</sup> Id.

**V. The Commission Should Reject Belated Efforts to Impose Access Charges on Competitive LECs that Utilize Unbundled Network Elements to Provide Local Exchange/Exchange Access Service**

The Rural Coalition and the Rural Companies urge the Commission to revisit its decision to bar incumbent LECs from recovering access charges from competitive LECs that utilize unbundled network elements to provide local exchange/exchange access service. These petitioners variously argue that this action violates, among other things, the Fifth Amendment of the U.S. Constitution, the Telecommunications Act of 1996 ("Telecommunications Act"), the non-discrimination provisions of Section 202(a) of the Communications Act of 1934, as amended ("Communications Act"), the mandate of the U.S. Court of Appeals for the Eighth Circuit in Iowa Utilities Board v. FCC (and consolidated cases), Case No. 96-3321, et al., (8th Cir. July 18, 1997), and Competitive Telecommunications Association v. FCC, Case No. 96-3604 (8th Cir. June 27, 1997), the "filed rate doctrine," and the Commission's own rules.

The Commission has dealt with these and other like objections to its decision to exclude unbundled network elements on not one, not two, but on three separate occasions. In implementing the local telephony provisions of the Telecommunications Act, the Commission rejected a host of arguments "opposing interexchange carriers' use of unbundled network elements to provide interexchange services," including contentions that relieving competitive LECs of the obligation to pay access charges on services provided over unbundled network elements violates both the letter and the spirit of the Telecommunications Act, as well as multiple provisions of the Communications Act. In so doing, the Commission highlighted claims that "it would be inappropriate to allow carriers to use unbundled elements to provide interexchange services because

this would amount to a flash cut reform of access charges before universal service issues are addressed,” and because “rural ratepayers could be subject to higher local service rates if interexchange carriers are allowed, before proceedings regarding access reform and universal service are completed, to bypass access charges through the purchase of unbundled elements.”<sup>38</sup> The Commission’s holding, and the rationale cited therefor, were clear:

[T]elecommunications carriers purchasing unbundled network elements to provide interexchange services or exchange access services are not required to pay federal or state exchange access charges. . . . [I]f we were to require indefinitely carriers purchasing unbundled elements to also pay access charges, then incumbent LECs would receive compensation in excess of their underlying network costs. This result would be inconsistent with the pricing standard for unbundled elements set forth in section 252(d)(1). In addition, we believe this conclusion is consistent with Congress’s overriding goal of promoting efficient competition for local telephony services, because it will allow, in the long term, new entrants using unbundled elements to compete on the basis of the economic costs underlying the incumbent LECs’ networks.<sup>39</sup>

The Commission also addressed the adverse impacts of which small incumbent LECs complained by adopting a “limited, transitional plan” pursuant to which certain new entrants using unbundled

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<sup>38</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶¶ 349 - 52 (1996), *motion for stay denied*, 11 FCC Rcd. 11754, *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19734 (1996), *further recon. pending, pet. for rev. pending sub nom. Iowa Utilities Board v. FCC* (and consolidated cases), Case No. 96-3321, *et al.*, (8th Cir. Sept. 5, 1996), *partial stay granted* 109 F.3d 1418 (1996), *stay lifted in part* (Nov. 1, 1996), *motion to vacate stay denied* 117 S.Ct. 429 (1996).

<sup>39</sup> Id. at ¶ 363 (footnotes omitted).

network elements would be required to pay access charges for a period of time.<sup>40</sup> This transitional plan was upheld by the Eighth Circuit.<sup>41</sup>

In this proceeding, the Commission reaffirmed its earlier findings, emphasizing the consistency of its determination with both the letter and the spirit of the Telecommunications Act. The Commission noted that neither Section 251(c)(3) nor Section 252(d)(1) “compel telecommunications carriers using unbundled network elements to pay access charges,” and that excluding unbundled network elements from access charges “ensures that unbundled elements can be used to provide services at competitive levels, promoting the underlying purpose of the 1996 Act.”<sup>42</sup> Critically, the Commission fully considered claims by incumbent LECs that rates for unbundled network elements would “not recover universal service support subsidies built into the access charge regime,” and explained in detail why “excluding access charges from the sale of unbundled elements will not dramatically affect the ability of price cap LECs to fulfill their universal service obligations.”<sup>43</sup> With respect to small rate-of-return incumbent LECs, the Commission noted that they are entitled to “petition the appropriate state commission for suspension or modification of the unbundling requirements of the 1996 Act,” and as rural carriers are “exempt[ed] from the

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<sup>40</sup> Id. at ¶ 365.

<sup>41</sup> Competitive Telecommunications Association v. FCC, Case No. 96-3604 at Sec. II.

<sup>42</sup> Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158 at ¶ 337.

<sup>43</sup> Id. at ¶ 338.

obligation to provide access to unbundled network elements until . . . a bona fide request for unbundled elements [has been received].”<sup>44</sup>

In a subsequent order rejecting a request that it stay its revised access charge rules, the Commission again rejected arguments that its refusal to permit incumbent LECs to levy access charges on unbundled network elements was inconsistent with either Eighth Circuit mandates or the non-discrimination provisions of the Communications Act, or “unlawfully undermine[d] incumbents’ ability to provide universal service.”<sup>45</sup> With respect to the latter point, the Commission emphasized that “because competition will not immediately erode access charge revenues to any significant degree, . . . the existing system . . . can continue to service its [universal service] purpose.”<sup>46</sup>

With respect to other arguments made by the Rural Petitioners, the Commission has repeatedly rejected claims by incumbent LECs under the Takings Clause of the Fifth Amendment as they relate to the Commission’s implementation of the local telephony provisions of the Telecommunications Act.<sup>47</sup> As the Commission has recognized, ratemaking does not become “confiscatory” simply because a regulated carrier fails to earn a desired rate of return or to recover all of its embedded costs. Rather, a rate methodology will pass Constitutional muster if the total

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<sup>44</sup> Id. at ¶ 337, fn 485.

<sup>45</sup> Access Charge Reform (Order), CC Docket No. 96-262, FCC 97-216, ¶¶ 5 - 21 (released June 18, 1997).

<sup>46</sup> Id. at ¶ 18.

<sup>47</sup> See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶¶ 733 - 40.

effect thereof reasonably balances investor and consumer interests.<sup>48</sup> As the U.S. Supreme Court has long recognized, agencies are "not bound to the use of any single formula or combination of formulas in determining rates:"

It is the result reached not the method employed which is controlling  
... It is not theory but the impact of the rate order which counts.<sup>49</sup>

And an end result is Constitutionally permissible if it produces rates which "enable the company to operate successfully, to maintain its financial integrity, to attract capital and to compensate its investors for the risks assumed . . . even though they might produce only a meager return on the so-called 'fair-value' rate base."<sup>50</sup>

Nothing in the Constitution shields carriers from losses or insulates their investors from declining investment values. Given that incumbent LECs will be able to recover the costs of unbundled network elements, as well as a reasonable profit, under Section 252(d)(1) of the Communications Act,<sup>51</sup> they will certainly be able to maintain their financial integrity, attract capital and compensate investors. Moreover, the U.S. Supreme Court has recognized that costing methodologies which mimic the operation of competitive markets are permissible so long as they

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<sup>48</sup> Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 at 603.

<sup>49</sup> Id. at 602.

<sup>50</sup> Id. at 605.

<sup>51</sup> 47 U.S.C. 252(d)(1).

do not jeopardize the operating and financial integrity of carriers.<sup>52</sup> And that is precisely what 252(d)(1) is designed to accomplish.

### **CONCLUSION**

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to reconsider its First Report and Order in a manner consistent with TRA's Petition for Reconsideration and these Comments.

Respectfully submitted,

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<sup>52</sup> Duquesne Light Co. v. Barasch, 488 U.S. 299 at 316, n. 10, 308-09; *see also* Metropolitan Transportation Authority v. Interstate Commerce Commission, 792 F.2d 287, 297 (2d. Cir. 1986), *cert denied* 479 U.S. 1017 (1986).



## **CERTIFICATE OF SERVICE**

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